he had never talked with Knight on the telephone (A 584-585, 593). On rebuttal, the government introduced, for impeachment purposes, a tape recording of a telephone call from Knight to petitioner (A 619-624). Petitioner acknowledged on surrebuttal that the voice on the recording was his, and that the conversation was confirmed by his records (A 626-627). The telephone call had been made by Knight on November 24, 1967, about eight months after the last sale, from a U.S. marshal's office where Knight was in custody. The call was made at the instance of a postal inspector who had Knight's permission to listen in and record the phone conversation (A 381, 610-614). The telephone conversation (set out at Pet. 11-13) did not relate to the offenses charged in the indictment. The jury was instructed that the recording was admitted solely to impeach petitioner by rebutting his statement that he had never spoken to Knight on the telephone (A 625).

## ARGUMENT

1. The recording of the telephone conversation, made with the consent of one party to the conversation, did not violate petitioner's Fourth Amendment rights. *United States* v. *White*, No. 13, O.T. 1970, decided April 5, 1971; *Rathbun* v. *United States*, 355 U.S. 107.

Petitioner claims that the recording should have been excluded because it was not produced pursuant to a pre-trial order for discovery. As the court below pointed out, the issue was not properly before

it since the contention was raised for the first time on appeal. In any event, it was within the discretion of the trial court to permit the introduction of the recording. Although as a general rule secretly made tape recordings are discoverable under Rule 16(a), the recorded conversation in this case was not a "relevant statement" within the meaning of Rule 16. It was not used in the government's case in chief, but only on rebuttal for impeachment purposes; the subject matter of the conversation was concededly innocuous and had no bearing on the substantive crime charged (Pet. App. A13).

2. Petitioner's attack on the conviction and sentence for conspiracy is fully answered in the opinion below (Pet. App. A5-10). Since petitioner's sentence on that count runs concurrently with longer sentences on the substantive counts, the conspiracy count is of no significance.

3. The fact that the government witness Knight admitted that he had used narcotics and the fact that he had been involved in criminal activity much of his life did not show that he was incompetent to testify. As the court below noted (Pet. App. A31-A32), the witness was responsive, clear and intelligent in his answers. The jury was aware of his prior history and could determine whether he was a credible witness.

4. The charge to the jury was not coercive. The language complained of (set forth in the opinion below at Pet. App. A29, n. 13) was given as part of the main charge, not after the jury had reported disagreement. Since the judge told the jury that if one

jury could not decide the case, another would have to try it, the jurors were aware of the possibility of disagreement. The judge made it clear that no juror should act against his conscience, but merely urged them to attempt to arrive at a verdict. This was not improper. *Brandom* v. *United States*, 431 F. 2d 1391, 1399 (C.A. 7), certiorari denied, 401 U.S. 942. See *Barash* v. *United States*, 412 F. 2d 26 (C.A. 2), certiorari denied, 396 U.S. 832; *Posey* v. *United States*, 416 F. 2d 545 (C.A. 5), certiorari denied, 397 U.S. 946.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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